IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30.08.2006

Coram

The Honourable Mr. JUSTICE K.MOHAN RAM

Civil Miscellaneous Appeal No.2224 of 2002
& C.M.P.No.13720 of 2005

D.Vilvanathan .... Appellant (Petitioner)

Vs.

1. G.Rajendran

2. The Senior Divisional Manager
Life Insurance Corporation Limited
20 Officers' Line, Vellore
North Arcot District .... Respondents (Respondents)

APPEAL under Section 47 (a) of the Guardians and Wards Act (8 of 1890) against the order and decree dated 17.09.2002 made in G.W.O.P.No.20 of 1993 on the file of the Principal District Judge, Vellore, Vellore District.

For Appellant : Mr. Prabakaran, for Mr. T.Dhanya kumar.
For Respondents: Mr. P.R.Balasubramanian, for R-1.
No Appearance, for R-2.

J U D G E M E N T

This appeal is directed against the order passed by the learned Principal District Judge, Vellore dated 17.09.2002 made in GWOP No.20 of 1993 in and by which the learned District Judge dismissed the GWOP No.20 of 1993.

2. For convenience, I shall refer the parties as arrayed before the District Court.

3. The case of the petitioner-maternal grandfather is briefly stated here-under:-

According to the petitioner, he is the maternal grandfather of the minors Yasini Yoganasindhu and Divya, whose dates of birth are 26.11.1990 and 12.08.1989 respectively; the petitioner's daughter-Tamilselvi was married to the first respondent on 22.05.1988 and the minors were born to them; the first respondent was employed as Assistant Administrative Officer in the United India Assurance Corporation; since both were employed the minor children were under the care and custody of the petitioner; Tamilselvi died on 24.03.1993 due to burn injuries; right from the date of marriage, the first respondent had been illtreating his wife-Tamilselvi by demanding dowry; the first respondent was given to several vices including wine and women; the petitioner's daughter-Tamilselvi

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died under tragic and mysterious circumstances; the diary kept by the deceased raised grave suspicion regarding the first respondent's culpability in the crime; even after the death of Tamilselvi, the minor children are continuing to be brought up under the care and custody of the petitioner; the petitioner is a retired Station Superintendent and living in a cosmopolitan atmosphere and the minor children are very much affectionate and attached to the petitioner and his wife and it would be conducive for the minor children to live only with the petitioner; the first respondent has no regard to the welfare of the minor children and he even refused to make financial contribution for their upbringing.

4. The first respondent has filed a counter denying all the allegations made in the petition. According to the first respondent since he and his wife were employed, the minor children ever since their birth were living in the petitioner's care and custody and they were being looked after by his wife. According to the first respondent, he tried to save his wife-Tamilselvi who sustained burn injuries due to stove burst and in that process he sustained very serious injuries which according to medical opinion amounts to 45% burns. The various allegations of dowry demand and ill-treatment of his wife have been denied. According to the first respondent, he was leading a very happy marital life with his wife-Tamilselvi. According to the first respondent his wife was never in the habit of maintaining any diary and the diary referred to by the petitioner ought to be a fabricated one. The first respondent had denied that he had ill-treated and neglected the minor children and the alleged refusal to make financial contributions for their upbringing is also denied. The first respondent has stated that the petitioner is interested only in the monetary benefits of Tamilselvi. According to the first respondent, he is the only fit and proper person to look after the minor children and he has no adverse interest. It is the further case of the first respondent that the petitioner had taken away the minor children and detaining them illegally against the wish of the minor children and the welfare and future of the minors will be very much affected if they are allowed to be under the care and custody of the petitioner.

5. The second respondent-Insurance Company has filed a counter affidavit stating that the second respondent is ready and willing to deposit the terminal benefits to which the deceased-Tamilselvi was entitled in the Court, if so directed by this Court.

6. Before the District Court, the petitioner got himself examined as P.W.1 and marked Exs.A-1 to A-7 and the first respondent got himself examined as R.W.1 and no documents were marked on his side.

7. On a consideration of the oral and documentary evidence adduced in the case, the learned District Judge dismissed the petition and being aggrieved by that the petitioner has filed the above appeal.

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8. Heard Mr.Prabakaran learned counsel appearing for the appellant and Mr.P.R.Balasubramanian learned counsel appearing for the first respondent.

9. The only point for consideration in this appeal is whether the learned District Judge is right in dismissing the petition filed by the petitioner and granting custody of the minor children in favour of the first respondent-father or whether the minor children have to be entrusted to the custody of the petitioner/appellant herein in the facts and circumstances of the case?

10. There is no dispute that the first respondent being the father of the minor children is their natural guardian. If it is established that the first respondent-father is a qualified person without any vices, he is entitled to be appointed as guardian for the minor children. Before considering the claim of both parties, it will be useful to refer to the settled principles of law that have to be kept in mind while considering the appointment of a guardian to the person and property of the minors.

11. A reading of Sections 17 and 25 of the Guardians and Wards Act 1890 (hereinafter referred to as "the Act") clearly shows that while appointing or declaring the guardian of a minor, the Court has to consider the welfare of the minor. While considering the question of welfare of the minor, the Court has to take note of the age, sex and religion of the minor, the character and capacity of the proposed guardian and his relationship to the minor, the wishes, if any, of a deceased parent. Further if the minor is old enough to form an intelligent preference to understand what is happening in and around him/her that may also be considered in preference to other conditions. While appointing a guardian, the paramount consideration is that his/her appointment shall not be against the will of the minor. In the light of the above said principles, the rival contentions have to be considered.

12. The learned counsel for the appellant submitted that the learned District Judge while considering the matter failed to take into account the welfare of the minors and has also failed to have due regard to the age and sex of the minors, about the character and capacity of the proposed guardian and his nearness to the minors. The learned counsel further submitted that the learned District Judge has committed a grave error in not ascertaining the wishes of the minors as the minors were aged about 14 and 12 and were studying 8th and 7th standards respectively, at the relevant time and were old enough to form an intelligent preference. It is further submitted that the learned District Judge even failed to examine the minors to ascertain their preference and therefore the learned counsel submitted that the learned District Judge failed to take into account the provisions contained in Section 17(3) of the Act. The learned counsel in support of his submissions relied upon the following decisions, namely:-

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(i) A.I.R. 2003 Madras 302 (R.Kasthuri Vs. R.Raveendran)
(ii) 1998 (3) M.L.J. 619 (N.Nirmala Vs. Nelson Jeyakumar) and

(iii) 2005 (9) S.C.C. 424 (Keshav R.Thakur and another Vs. Suchhibai).

13. The learned counsel for the first respondent fairly submitted that there cannot be any dispute regarding the legal principles to be applied in a case of this nature, but submitted that since the petitioner is aged about 76 years, he himself needs support as the petitioner's wife is also not alive. He further submitted that though one of the petitioner's son and his wife are living with the petitioner they have got a son to look after and hence they may not be in a position to take care of the minors. He further submitted that the first respondent being the father and natural guardian of the minors, he has a preferential right over the petitioner and the learned District Judge has not found anything against the first respondent.

14. At the outset it has to be pointed out that the learned District Judge after considering the oral evidence of P.W.1 and R.W.1 has found that the allegations made by the petitioner against the first respondent have not been established. The learned District Judge has also pointed out that after the death of Tamilselvi, an enquiry was conducted by the Revenue Divisional Officer and came to the conclusion that Tamilselvi died only due to the fire accident and the District Judge has also pointed out that the first respondent had also sustained injuries and therefore held that there is no suspicion in the death of the first respondent's-wife. The learned District Judge after taking into consideration of the fact that the petitioner is a widower and a retired employee and the first respondent has not remarried and his monthly salary as an Assistant Administrative Officer in the United India Assurance Corporation was Rs.20,000/- and his carry home pay was Rs.5,000/- held that the petitioner is not suitable to be appointed as a guardian to the minors.

15. The learned District Judge considering the age of the petitioner and the income and status of the first respondent came to the conclusion that in the interest of the minors, the first respondent-father has to be appointed as a guardian as he can take care of the welfare of the children. Though the learned District Judge has pointed out that the petitioner has brought up the minors for more than 10 years, failed to ascertain the wish and preference of the minors.

16. In A.I.R. 2003 Madras 302, in paragraphs 10 and 11, it is observed as follows:-

> "10. It is axiomatic that the welfare of the child is of paramount consideration. The way in which the boy answered the questions shows that he is an intelligent boy and he knows his preference. He has been living with his mother for the past 12 years and his educational needs have been taken care of by his mother. There is absolutely no evidence of ill-treatment by her, but on the other hand, the boy's statement shows that his care has been taken very well by his mother and her relatives. His statement also shows that he is doing well in the class and if

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the boy is uprooted now and placed in the custody of the father, we are of the view that that will unsettle his educational career and his future prospects also.

11. Though both the parents are affectionate to the child, it is clear that the child has been brought up by the mother all along from the childhood. We are of the view that if the child is taken away from the custody of the mother, it would affect his personal and educational career and we therefore hold that the custody of the child should continue to be with the mother".

17. In 1998 (3) M.L.J. 619, in paragraphs 28 and 31, it is laid down as follows:-

"28. It is settled in law that normally due to immaturity, in the sense, not able to form an independent decision or opinion, the preference of the minor should not control the Court as a decisive fact in deciding the custody of a minor. But, where the child who has been away from the mother for a long period, should not be forced to go back, against the inclination of the minor, as it may have an adverse effect on the mind of the minor. Therefore, under what circumstance the preference of the minor to be taken into consideration always depends upon the facts and circumstances of each case.

31. So far as the intelligent preference of a minor is concerned, it is always better to bear in mind the age and also the capability of the minor forming an intelligent preference. That is why, the selection of guardian by such an infant is according to the statutory provisions, subject to the rule of the Court. The Court may disapprove the selection made by the minor when, in its judgement, the person selected is not the proper person to be the guardian. But, ordinarily, it is the duty of the Court to appoint the person so selected, if he is competent and suitable although the Court may be of the opinion that some other person would fill the position better. Unless the court is satisfied that the choice of the minor is detrimental to her interest or contrary to law, she should be permitted to exercise her right".

18. In 2005 (9) S.C.C. 424, in paragraph 5, it is observed as follows:-

"5. .... As the grandparents have by reason of interim order or otherwise remained in care and control of the minor Appellant 2 for his entire life, it will not be appropriate to grant custody of the child to the mother at this stage. Appellant 1, however, will allow the mother to meet the child

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whenever the respondent approaches them for the purpose."

19. In this context it will be useful to refer to A.I.R. 1992 S.C. 1447 (Kirtikumar Maheshankar Joshi Vs. Pradipkumar Karunashanker Joshi), in the case before the Supreme Court, the minor son and daughter were aged about 13 and 11 years respectively. After considering the details with regard to father as well as the maternal uncle of the minors and after examining both the minor children in person, after recording their statement and wishes, qualities of father and maternal uncle, the Supreme Court concluded as follows:-

"7. ... We are conscious that the father, being a natural guardian, has a preferential right to the custody of his minor children but keeping in view the facts and circumstances of this case and the wishes of the children, who according to us are intelligent enough to understand their well-being, we are not inclined to hand over the custody of Vishal and Rikta to their father at this stage.....".

20. In Kishore Vs. Manju alias Manjula, reported in 1999 (3) M.L.J. 269 : (2000 AIHC 3683), a Division Bench of this Court has held that the willingness of the minor boy who is aged 14 years, is also to be taken into consideration because he has become sufficiently old even though a minor to come to a rational conclusion especially when a dispute is pending in Court in regard to his custody between his father and mother.

21. The materials placed by both parties show that the first respondent-father suffers from no legal disqualification and there is no evidence to show that he has bad conduct. At the same time, the minor children are all along living with the maternal grandfather-the petitioner herein and the first respondent-father himself has admitted in his evidence that even while his wife was alive the children were with the petitioner and his wife. There is nothing on record to show that the petitioner is in any way disqualified to act as a guardian of the minors.

22. Apart from all these pros and cons, in the light of the statutory provisions contained in Section 17 of the Act, the welfare of the minors is paramount consideration while considering the appointment of guardian for the minors. As per my directions the petitioner, the two minor children, maternal uncle of the minors and the first respondent were present in my chambers. I spent considerable time with them. As on date, the minors are aged about 17 and 16 and they are studying in 12th and 11th standard respectively. I also enquired the father and maternal grandfather. I spent nearly two hours with them and I am satisfied that both the minor children are intelligent and they are more matured than their age. Both of them are bitter about their father and they categorically stated that they are not willing to live with their father, but they are very happy with their maternal grandfather who according to them is looking after very well. In fact both the minors recalled the tragic circumstances under which their mother

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died and they hold their father responsible for the death of their mother. I permitted the father to be with the children for a considerable time to persuade them to join with him. I also tried to persuade the children to go and live with their father, but they refused to do so. The maternal uncle of the children was also questioned and he stated that in the interest of the children he delayed his marriage and only recently at the age of 33 or so he got married and he further stated that he and his wife are taking better care of the minor children and they will continue to do so in future also. After talking to the children and assessing their state of mind, I am of the view that it would not be in the interest and welfare of the children to hand over their custody to their father-the first respondent herein. I am also conscious of the fact that the father, being a natural guardian, has a preferential right to the custody of his minor children, but keeping in view the facts and circumstances of this case and the wishes of the children, who according to me, are intelligent enough to understand their well being, I am not inclined to hand over the custody of the minors Yasini Yoganasindhu and Divya to their father at this stage.

23. It is pertinent to point out that the minor children are being brought up by the petitioner-appellant herein all along from their childhood. In fact, the minor children stated that if they are handed over to the custody of their father, they will be psychologically affected and will always be reminded of their mother's death and that will affect their studies. Therefore, I am of the considered view that if the children are taken away from the custody of the petitioner-grandfather, it would definitely affect their personal and educational career and I therefore hold that the custody of the children should continue to be with the petitioner/appellant - the maternal grandfather.

24. All the above said aspects have not been kept in mind by the learned District Judge while passing the order. Therefore the order of the learned District Judge is set-aside subject to the following directions:-

(i) The maternal grandfather/Mr.D.Vilvanathan, the appellant herein is permitted to keep custody of the minor children Yasini Yoganasindhu and Divya;

(ii) The father of the minor children/G.Rajendran, the first respondent herein, shall be permitted by the appellant herein to meet the children on holidays or on any other day with prior notice to the appellant and the first respondent can take the children out of the appellant's house for recreation, entertainment or for shopping with the concurrence of the children;

(iii) The first respondent shall provide financial support to his minor children to pursue their further studies.

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25. Therefore for the reasons stated above the appeal stands allowed. But however there will be no order as to costs. Consequently, the connected CMP is closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

srk

To

1. The Principal District Judge,
Vellore, Vellore District.

2. The Record Keeper,
V.R. Section,
High Court, Madras.

1 cc to Mr.T. Dhanyakumar, Advocate, Sr. 39541
1 cc to Mr.P.R.Balasubramanian, Advocate, sr. 39429

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